1986

The State of Utah v. Harry F. Suniville : Brief of Appellee

Utah Supreme Court

Bradley P. Rich; Yengich, Rich, Xiaz and Metos; attorney for appellant.
David L. Wilkinson; attorney general; Earl F. Dorius; assistant attorney general; attorneys for respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	860431
Plaintiff-Respondent,	:	
v.	:	Case No. 860431
HARRY F. SUNIVILLE,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OFF UUTAH CODE ANN. §76-5-302 (1978), IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FFOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE LEONARD H. RUSSON, PRESIDING.

DAVID L. WILKINSON
Attorney General
EARL F. DORIUS
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Respondent

BRADLEY P. RICH
YENGICH, RICH, XIAZ & METOS
72 East 400 South, Suite 355
Salt Lake City, Utah 84111

Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
v.	:	Case No. 860431
HARRY F. SUNIVILLE,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OFF UUTAH CODE ANN. §76-5-302 (1978), IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FFOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE LEONARD H. RUSSON, PRESIDING.

DAVID L. WILKINSON
Attorney General
EARL F. DORIUS
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Respondent

BRADLEY P. RICH
YENGICH, RICH, XIAZ & METOS
72 East 400 South, Suite 355
Salt Lake City, Utah 84111

Attorney for Appellant

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether defendant used a firearm or a facsimile of a firearm while robbing the Mountain America Credit Union on February 28, 1986, when he pointed an object concealed in his pocket at the victim and said, "This is a robbery. Don't turn it into a homicide," and "If anyone tries to follow me, I will blast you."

2. Whether the trial court instructed the jury as to the proper definition of "facsimile."

3. Whether the trial court abused its discretion by refusing to give a requested cautionary eyewitness instruction.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
v.	:	Case No. 860431
HARRY F. SUNIVILLE,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Defendant, Harry F. Suniville, was charged with Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. §76-6-302 (1978).

Defendant was convicted of Aggravated Robbery in a jury trial held June 11, 1986, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Leonard H. Russon, presiding. Defendant was sentenced by Judge Russon on July 7, 1986, to five years to life at the Utah State Prison to run consecutively with another sentence appellant was already serving (R. 11-14, 106-07).

STATEMENT OF THE FACTS

On February 28, 1986, during the noon hour, a man entered the Mountain America Credit Union in Midvale, Utah. He wore a dark striped knitted ski mask over his face (R. 140), a long gold-yellow, parka-type hunting coat (R. 150), and blue jeans (R. 158). He went to bank teller Suzette Anderson's window. She observed that his right hand remained in the pocket of his coat (R. 140). He raised the pocket up over the counter

above the window "like he had a gun" (R. 140). The teller observed, "[t]here was something pointing at me in his pocket" (R. 140). The assailant then said, "This is a robbery. Don't turn it into a homicide. Give me all of your money." (R. 140). As the teller opened her drawer, the robber said, "Big bills," and "I know about the bait money." (R. 141). As Suzette started going through the money, the man grabbed it with his left hand, put it in his left pocket, and headed toward the front door (R. 141). When he got to the door, he stopped and said, "If anyone tries to follow me, I will blast you." (R. 141). He opened the door and went out heading west toward the parking lot (R. 144). As he left, his right hand remained in his coat pocket (R. 159).

Ms. Anderson later filled out a police report giving her perception that the assailant had a gun (R. 154), although she never personally saw a gun (R. 152). At trial, she described the robber as a white male, 25-32 years old, six feet tall, 180-200 pounds, with blue or green eyes and brown hair (R. 140, 147, 149). She also noted that he walked with an unusual gait (he bounced while his feet scraped against the floor) (R. 142). Although she could not identify her assailant, she did note defendant's gait during the trial and said it was "very similar" to that of the robber's (R. 142-43).

Dan Parker, a construction worker, was eating his lunch in his truck just outside the credit union when he saw a man, whom he later identified as defendant (R. 169-70), exit the credit union wearing a blue knitted ski mask and a beige or gold mountaineer-type coat (R. 166-67, 174). The defendant pulled the

mask off as he ran directly in front of Parker (R. 167-175). His right hand was in the pocket of his coat (R. 177). Parker suspected a robbery and ran after the defendant shouting at him (R. 167-68). Defendant did not stop but continued to run through an underground parking area, jumped a short wall and got into a late 70's or early 80's dark brown Camero (R. 169-70, 185) which was parked in an uncovered parking lot (R. 168). As defendant reached his car, he looked directly at Parker (R. 169, 178-79). Parker subsequently identified defendant's photograph from photo spreads twice prior to trial (R. 191, 194, 196). He also identified defendant at a preliminary hearing and at trial (R. 169, 196). Parker described the man he saw as being 20-30 years old, six feet tall, weighing 140 pounds and having brown hair (R. 181-82). He said that during the incident defendant always kept his right hand in the pocket of the large beige coat he was wearing (R. 176-77).

As defendant exited the credit union and pulled off his mask, he was also seen by Harry Barker and Jeffrey Hill who were working together just underneath the covered parking area (R. 221). Barker saw defendant exit the building, pull off a dark blue or black ski mask, and hold it in his left hand, and start running directly toward them at a distance of 75 feet (R. 222, 227). Barker alerted Hill to what was gong on (R. 222). Barker observed defendant slow down as he came within 15 feet of them before he ran around them (R. 228-29). Barker even told the man, "You look like you just robbed a bank." (R. 223). Barker described the man as a white male, six feet tall, 160-170 pounds,

brown hair, clean shaven, wearing faded blue jeans, worn work boots, and a tan parka with a drawstring pulled tight below his belt (R. 230-32). He was also carrying something in his right hand[1] and the mask in his left hand (R. 231-32).

Barker positively identified defendant at trial as the person he had seen fleeing that day (R. 223-224). He had previously observed a photo spread and picked out two photos of persons who looked like the assailant. One was of the defendant (R. 224-25, 236-38; Defendant's Exhibit 5-D).

Jeffrey Hill observed the defendant come off the stairs just outside the credit union (R. 203) and run toward them from a distance of 40 feet until he was 15 feet from them (R. 215). He described the man as five feet eleven inches tall, with brown hair, wearing a heavy coat (R. 203).[2] The man had both hands out of his pockets and was carrying a navy blue or black stocking in his left hand (R. 204, 215-16). He noted the man has the "same unusual type stride or walk" that defendant exhibited at trial (R. 206). Hill picked defendant's photograph out of a photo display (R. 207), and he positively identified defendant at trial as the man he had seen running from the credit union (R. 204, 207).

---

[1] Barker testified as follows: "He had something in his right hand, but I couldn't tell what it was. I didn't know whether it was a gun or something else. I just couldn't tell what it was" (R. 231).

[2] On direct examination, Hill was not sure of the color of the coat. However, on cross-examination he said it was "a greenish-brown army color" or "khaki" (R. 216).

Nick Dubois was also working in the area at noon on February 28th (R. 239). He heard someone yelling and saw other workmen running across the upper level of the parking lot toward him pointing and motioning (R. 240). He then saw someone run out from underneath the parking terrace (R. 240). The man had something in his hand (R. 241). Someone yelled, "the bank has been robbed!" (R. 240). Dubois then saw the man run across the lot and jump into a car (R. 242). Aware there had been a possible robbery, he watched the car "very closely" (R. 242). He described it as a chocolate brown Camero built between 1970-75 with no license plate (R. 242-43). The chrome "beautifier" rims on the wheels of the car were all bent (R. 243, 250-51). Although he could not identify defendant, a week and a half after the robbery occurred, Dubois observed the same "chocolate brown Camero" parked in front of defendant's residence (R. 245-48). Defendant was later arrested while driving the same Camero (R. 266).

After the State rested, the defendant moved to dismiss or in the alternative, moved to reduce the charge to simple robbery on the theory that the state had failed to establish that a firearm, knife or facsimile of a firearm or knife or a deadly weapon had been used in the commission of the robbery as required by Utah Code Ann. § 76-6-302(1)(a) (1953), as amended (R. 287-96). Following argument, the motion was denied (R. 296).

The defense requested an instruction defining facsimile as "an exact and precise copy, preserving all the marks of the original" (Defendant's requested instruction No. 6; R. 56). The

court refused the instruction and gave the prosecution's requested instruction which read, "A facsimile of a firearm is any item or thing that by its appearance resembles a firearm." (Inst. No. 18; R. 72; cf. Prosecution's requested instruction No. 7 (R. 47)). The defense also requested a limited form of a cautionary instruction on eyewitness identification which was refused by the court (Defendant's requested instruction No. 5; R. 55). The court did give general instructions on the credibility of witnesses (Instruction Nos. 6 and 10, R. 60, 64). All of the above instructions are set forth in Appendix A of this brief. The defense made timely objection to the court's refusal to give his requested instructions (R. 320-32).

Based upon the evidence presented at trial, the jury found defendant guilty of aggravated robbery on June 11, 1986 (R. 83). On June 26, 1986, defendant moved to arrest judgment because Judge Russon had denied his request that a cautionary eyewitness instruction be given to the jury (R. 104). On July 7, 1986, Judge Russon denied defendant's motion and sentenced him to five years to life at the Utah State Prison. This sentence was to run consecutively with a sentence defendant was already serving (R. 106).

From this judgment and sentence defendant now appeals (R. 108).

SUMMARY OF ARGUMENT

Because defendant created a belief in the victim through words and actions that defendant truly did have a gun in his pocket and intended to use it, a facsimile of a firearm was effectively employed in the robbery.

The trial judge correctly instructed the jury as to the proper meaning of the term "facsimile."

Finally, because this Court's decision in State v. Long, 721 P.2d 483 (Utah 1986), does not retroactively apply to appellant's case, the giving of cautionary instructions on eyewitness identification is left to the discretion of the trial judge, and the trial judge did not abuse his discretion in refusing to give appellant's requested cautionary eyewitness instruction.

ARGUMENT

POINT I

THE EVIDENCE SUFFICIENTLY ESTABLISHED THAT A FACSIMILE OF A FIREARM WAS USED IN THE ROBBERY.

Defendant suggests there is no evidence that he used a firearm or a facsimile of a firearm while robbing the Mountain America Credit Union.

While none of the witnesses actually saw a firearm and no gun was found, Suzette Anderson saw what she perceived to be a gun pointing at her from inside the defendant's right pocket. She also heard him say "don't turn it into a homicide" and "If anyone tries to follow me, I will blast you." It was her reasonable belief that defendant would shoot her if she did not quickly give him the money, and she even advised the investigating officers that her assailant had a gun (R. 140-41, 154).

Harry Barker also observed something in defendant's right hand as he ran past him, but Barker was unsure whether it was a gun (R. 231).

Utah Code Ann. §76-6-302(1) (1978), provides:

> (1) a person commits aggravated robbery if in the course of committing robbery, he: (a) uses a firearm or a facsimile of a firarm, knife or a facsimile of a knife or a deadly weapon . . . .

The criminal code contains no definition of facsimile of a firearm.

The lower court applied a subjective test to determine whether a firearm or a facsimile of a firearm was used in the robbery.[3] The clear majority of jurisdictions that have considered this issue have supported this test and have held that the use of an unarmed robber's hand in such a way as to convey the impression that the robber is armed will bring the robbery within the statutes proscribing actual armed robbery. See State v. Hopson, 122 Wis.2d 395, 362 N.W.2d 166, 169-70 (Wis. Ct. App. 1984), and all cases cited therein.

The basic relationale behind the subjective test is twofold. First:

> [A] victim who is threatened with a supposed weapon which is concealed is put in the same degree of fear and feels as strongly compelled to comply with the robber's demands as a victim who is threatened with a weapon

---

[3] Judge Russon stated: "[i]t is the Court's belief and interpretation of the statute involved [76-6-302], and in light of State v. Turner, that when one uses any object with the intent to make the victim believe there is a gun and the victim reasonably could believe there is a gun, that whatever object is being used is, in fact, a facsimile of a firearm whether it is a piece of pipe in the pocket or a plastic gun or even a finger, if that is perceived by the victim as being a gun and is intended by the perpetrator to be a gun or to at least make the victim think it is a gun, I believe we have the elements necessary to meet requirements of aggravated armed robbery" (R. 296).

which is openly displayed.[4]

Hopson, 362 N.W.2d at 169. And second:

> To find as a matter of law that where a gun is not seen a defendant cannot be convicted of the armed feature is to allow all would-be robbers to keep a gun or other dangerous weapon concealed during the crime to be used only if needed. To read the statute in this light 'would have the effect of placing it in the power of the transgressor to defeat the object and purpose of the law by evasion.'

State v. Cooper, 140 N.J. Super. 28, 354 A.2d 713, 717 (N.J. Super. Ct. Law Div. 1976). See also, Breedlove v. State, 482 So. 2d 1277, 1281-82 (Ala. Crim. App. 1985); State v. Henderson, 34 Wash. App. 865, 664 p.2d 1291, 1293 (1983). The sole concern with the subjective test is the possibility that a suspect might be convicted of aggravated (armed) robbery merely because the victim believed, without support for the belief, that the suspect might be armed. Hopson, 362 N.W.2d at 170. However, this Court may adopt a construction of the statute which requires, as occurred in this case, that the victim's belief be reasonable. Id.

Defendant contends that this Court has not adopted a subjective standard test to determine what constitutes a facsimile. However, in State v. Turner, 572 P.2d 387 (Utah 1977), this Court quoted the definition of "facsimile" as found in Webster's New Unabridged Dictionary, 2d Edition, as: "1. Act of making copy, imitation" (Emphasis added). The Court then

---

[4] It is clear that even a finger placed in the pocket in the shape of a gun when combined with the defendant's threatening actions and/or words is capable of causing the victim to believe the defendant is armed.

cited People v. Delgardo, 1 Misc. 2d 821, 146 N.Y.S.2d 350, 356 (1955) as an explanation for the word imitation:

> The word imitation when applied to pistols and revolvers means so nearly resembling the genuine as to mislead, with the apparent object of producing, and likely to produce, upon the minds of those against whom it is to be used, the belief that the imitation weapon is capable of producing all the injurious consequences to the victim as the use of the genuine article itself.

Id.

When defendant raised an object concealed in his pocket over the teller's counter and pointed it at the victim while exclaiming "don't turn it into a homicide," and later said, "I will blast you," it is clear he wanted Ms. Anderson to believe he was armed with a weapon. Defendant's words and actions produced this belief in the victim and placed the robbery within the meaning of Utah Code Ann. § 76-6-302(1)(a).

The evidence established that defendant used a facsimile of a firearm. Therefore, his conviction for armed robbery was proper.

POINT II

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE CORRECT DEFINITION OF "FACSIMILE".

Judge Russon gave the jury the following definition of facsimile as instruction number 18:

> A facsimile of a firearm is any item or thing that by its appearance resembles a firearm (R. 72).

Defendant contends that his requested instruction also needed to be given to the jury to correct the vague and imprecise nature of instruction no. 18 (See Appellant's Brief at 11). His requested instruction states in pertinent part:

> A facsimile is defined as an exact and precise copy, preserving all the marks of the original.

(R. 56). He cites this Court's decision in Turner as supporting his position. The lower court in Turner gave two facsimile instructions to the jury (instruction nos. 11 and 12). Instruction no. 11 was similar to defendant's requested instruction in the instant case:

> You are instructed that a facsimile is defined as: an exact and precise copy of anything. An exact reproduction, for example, the signature reproduced by a rubber stamp.

State v. Turner, 572 P.2d at 389. Instruction no. 12, which is substantially the same as the court's instruction no. 18 in the case at bar, reads:

> You are further instructed that a facsimile of a firearm is any instrument that by its appearance resembles a firearm.

Id.

The defendant in Turner asserted, as does defendant in the present case, that instruction no. 11 was acceptable but that instruction no. 12 "expands the meaning of 'facsimile' beyond its proper definition." Id. This Court, however, did not agree. It found "the [lower] court's instruction no. 12 to be a 'sensible interpretation' of the statutory language." Id.

The Court was primarily concerned that instruction no. 11 would conflict with the "sensible" instruction no. 12 and create confusion and vagueness. This Court, however, "did not perceive sufficient tension between the definitions of 'facsimile' in instruction nos. 11 and 12 to constitute defective vagueness." Id.

Applying Turner to the instant case, the lower court's instuction no. 18 was "a sensible interpretation of the statutory language." No additional facsimile instruction needed to be given to correct any supposed vagueness or imprecision.

POINT III

THE TRIAL COURT PROPERLY REFUSED TO GIVE DEFENDANT'S REQUESTED JURY INSTRUCTION ON EYEWITNESS IDENTIFICATION.

Defendant was tried and convicted of aggravated robbery on June 11, 1986. Nine days later, this Court in State v. Long, 721 P.2d 483 (Utah 1986), required that from the day Long was filed (June 20, 1986), judges were to give cautionary jury instructions on eyewitness identification whenever such an instruction is requested by the defendant and when eyewitness identification is a central issue in the case. Id. at 492.[5]

Six days after Long was decided, defendant filed a motion to arrest judgment because the judge had refused to give defendant's requested cautionary instruction at trial (R. 104, 321).[6] On July 7, 1986, defendant's motion was denied and he was sentenced (R. 106).

---

[5] Prior to Long, this Court had held that the giving of such cautionary instructions was to be left to the discretion of the trial court. State v. Booker, 709 P.2d 342, 346 (Utah 1985); State v. Tucker, 709 P.2d 313, 316 (Utah 1985).

[6] The scope of defendant's so-called cautionary instruction was very limited (See Defendant's requested instruction no. 5, R. 55, set forth in Appendix A). It merely advised the jury that the state had the burden of proving identity beyond a reasonable doubt, and noted that identification testimony depends on the opportunity of the witness to observe the offender at the time of the offense and make a reliable identification later. It did not purport to "advise the jury as to the potential difficulties of eyewitness identification" or "comport in substance with the type of jury instruction that this court mandated in Long" (Appellant's brief at 14-15).

Defendant contends that it would be arbitrarily unjust to exclude him from receiving Long's benefits simply because his verdict and conviction were rendered nine days before Long was decided especially since he was not sentenced until July 7, 1986 (Appellant's Brief at 16).

This Court specifically intended that Long be applied prospectively:

> We therefore today abandon our discretionary approach to cautionary instructions and direct that in cases tried from this day forward, trial courts shall give such an instruction whenever eye-witness identification is a central issue in a case and such an instruction is requested by the defense.

State v. Long, 721 P.2d at 492 (emphasis added). The relevant language could be read in a reasonable, common sense manner as cases commenced from this day forward. At most, the term "tried from this day forward" might be construed to accommodate cases commenced before Long, but where the jury was not yet instructed. But the language should not be tortured to cover cases like the instant one, where the jury had already rendered its verdict and had been dismissed.

This case was in fact tried before Long was decided. Both sides had rested, the jury had rendered its verdict and had been excused. It would not have been reasonable or practical to reconvene the jury and ask them to reconsider their verdict in light of Long, and give them a detailed cautionary instruction on eyewitness identification. Nor would it have been necessary given the corroborative evidence in this case.

Defendant claims that any refusal to accord him the retroactive benefit of Long would be arbitrary. However, it is well-established that the federal constitution "neither prohibits nor requires" retroactivity of state judicial decisions. Linkletter v. Walker, 381 U.S. 618, 629 (1965); Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932). Rather, "[t]he federal constitution has no voice upon the subject" and the Supreme Court has left the states to develop their own rules on retroactivity: "a state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." Sunburst Oil, 287 U.S. at 364. Thus, either choice affords due process of law. Id. at 363-64. Cf. Andrews v. Morris, 677 P.2d 81 (Utah 1983) (refusing to extend retroactive benefit of State v. Wood, 648 P.2d 71 (Utah 1982), cert. denied, 469 U.S. 988 (1982), to cases already final; and State v. Norton, 675 P.2d 577, 583-84 (Utah 1983), cert. denied, 466 U.S. 942 (1984) (according retroactive benefit of Wood to cases not yet final).

Finally, defendant claims that even if the pre-Long standard of this Court is applicable to his case, it was an abuse of the trial court's discretion not to give his requested instruction. In a post-Long case which was tried before Long was decided, this Court held that judicial discretion could be used to decide if a cautionary instruction should be given:

> [T]he Long decision was specifically limited in its application to cases tried after its date of issuance. Trial of the present case preceded Long, and therefore defendant's

> claim must be evaluated under prior case law to determine whether the trial court abused its discretion in refusing to give the required cautionary instruction.

State v. Jonas, 725 P.2d 1378, 1380 (Utah 1986).

In Jonas, this Court ruled that the trial judge abused his discretion by not giving the requested cautionary instruction. However, Jonas is easily distinguishable from the instant case. In Jonas there was a solitary eyewitness, the victim, who observed his assailant for only an instant before being stuck in the ribs with a handgun and knocked unconscious. The victim was attacked at night and appeared to be uncertain as to the location of the assault and the identity of the perpetrator. The instant case is more comparable to this Court's recent decision in State v. Quevado, Utah, No. 19049 (March 26, 1987). In Quevado, this Court held that the lower court did not abuse its discretion in refusing to give a cautionary instruction when the defendant was convicted based upon the testimony of four eyewitnesses and the identification of the jacket the defendant wore when arrested as the same jacket worn by the fleeing suspect. Id. at 3. See also, State v. Remington, Utah, No. 86031 (March 31, 1987).

In the case at bar, there were three eyewitnesses who identified defendant as the person they saw running from the credit union at noon on February 28, 1986. All three eyewitnesses observed defendant for far more than a few seconds at a relatively close distance. They all paid close attention to what they saw since they suspected foul play.

There was also corroborating evidence to support the eyewitness identification. A witness positively identified defendant's car as the same vehicle used in the robbery[7] and the victim and another eyewitness in this case observed that defendant virtually had the same distinctive gait as the assailant.

This case is similar to other pre-Long cases in that "it is highly likely that the result would have been exactly the same even if a cautionary instrution had been given." Jonas, at 1380.

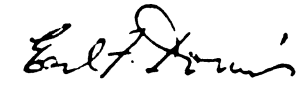
Moreover, in his closing argument, defense counsel fully presented the critical factors in eyewitness identification which lasted for a total of 13 pages in the transcript (R. 336-49). Thus, the jury was sufficiently alerted to the possibility of error in eyewitness identification.

CONCLUSION

Based on the foregoing analysis, the State respectfully requests that defendant's conviction be affirmed.

DATED this 10th day of April, 1987.

DAVID L. WILKINSON
Attorney General



EARL F. DORIUS
Assistant Attorney General

---

[7] This Court held in Quevado that the identification of the defendant's jacket was "not so subject to error as the identification of a person". Id. at 3.

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Bradley P. Rich, Attorney for Appellant, 72 East Fourth South, Salt Lake City, Utah 84111 this 10th day of April, 1987.